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Citation: Pickard, Rob (2008) Consultation, authorisation and enforcement in England : integration of heritage and planning and comparisons with Ireland. In: Integrated management tools in the heritage of south-east Europe. Council of Europe Publishing, Strasbourg, pp. 233-254. ISBN 978-9287162649

Published by: Council of Europe Publishing

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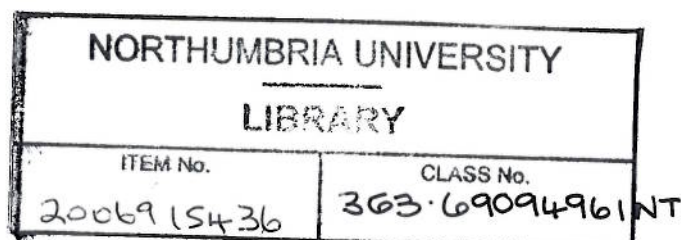
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Directorate of Culture and Cultural and Natural Heritage  
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Council of Europe Publishing  
F-67075 Strasbourg Cedex  
<http://book.coe.int>

ISBN 978-92-871-6264-9  
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Printed at the Council of Europe



## Examples of good practice in authorisation and enforcement

### 1. Consultation, authorisation and enforcement in England: integration of heritage and planning, and comparisons with Ireland

Robert Pickard

#### 1.1. Consultation and authorisation

Before explaining the consultation and authorisation procedures (and the proposals to change them), it is necessary to explain briefly how the cultural built heritage is integrated into the planning system in England. This chapter refers mainly to the system in England, as the legal provisions and planning systems are slightly different in each of the four parts of the United Kingdom – England, Scotland, Wales and Northern Ireland – though the situation in Wales is very similar to that of England.

There are three main forms of protection for the immovable cultural heritage:

1. Listed Buildings (buildings chosen for statutory protection because of their special architectural or historic interest); there about 500 000 listed buildings in the United Kingdom, over 400 000 of which are in England;
2. Conservation Areas (areas of special architectural or historic interest); there are about 10 000 of these in the United Kingdom, of which about half are in rural areas (small towns, villages or countryside) and half in urban areas (including historic centres of cities, and even suburbs);
3. Scheduled Monuments (archaeological sites and other “ancient monuments”, including some buildings, for example, structures of the industrial heritage that are no longer in use); some buildings are both listed and scheduled (but the law for the latter is stricter and will apply first).

The legislation for listed buildings and conservation areas has been developed through planning law, and until the Town and Country Planning Act 1990 (here the TCP Act 1990) the provisions for them were contained in the main planning legislation. These designations remain integrated within the planning system, but were given separate legislation in 1990, namely the Planning (Listed Buildings and Conservation Areas) Act 1990 (here the P(LBCA) Act 1990). The TCP Act 1990 remains the principal planning Act but a new piece of legislation, the Planning and Compulsory Purchase Act 2004 (PCP Act 2004), has brought changes to the system of land use plans at strategic level (now



based on regions) and local authority level as well as making "sustainable development" a statutory requirement of the land-use planning system.

The legislation for scheduled monuments – the Ancient Monuments and Archaeological Areas Act 1979 (AMAA Act 1979) – is not directly integrated with the planning system. However, since the late 1980s, when a number of significant archaeological discoveries were made in the course of new development, government policy on ancient monuments and archaeological remains, in the context of the planning system, has been strengthened. In 1990, Planning Policy Guidance Note 16: Archaeology And Planning (PPG 16) was issued to provide guidance for local planning authorities, property owners, developers, archaeologists, amenity societies and the general public, with particular reference to the handling of archaeological remains in the development plan and development control (planning consent) systems. Paragraphs 15 and 16 of PPG 16 specifically indicate that development plans should include policies for the protection, enhancement and preservation of sites of archaeological interest and their settings, including scheduled sites and other, unscheduled archaeological remains (those remains not directly protected by law) of more local importance. Paragraph 18 further indicates that the desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application, whether the monument is scheduled (formally protected) or not. In fact, this follows a court ruling dating from 1975.

Another Planning Policy Note, PPG 15: Planning and the Historic Environment (issued in 1994 jointly by the two government departments responsible for cultural heritage and planning respectively – which reveals the level of consultation between government departments), further endorsed this view. Moreover, PPG 15 highlights the fact that any aspect of the "historic environment" is a material consideration in the determining of planning applications for new development. Thus, listed buildings and conservation areas are considered in this context. Moreover, the web extends further, as other aspects of the "historic environment" must be considered. (The term "historic environment" covers all elements of built heritage in the environment, whether protected individually or not.) These include some non-statutory designated sites, such as:

- sites included in the Register of Historic Parks and Gardens of Special Interest in England;
- sites included in the Register of Historic Battlefields;
- World Heritage Sites (the United Kingdom is a signatory to the UNESCO convention).

Both PPG 15 and PPG 16 are being reviewed and it has been proposed that the new planning statement will amalgamate the issues covered in these guidance documents following a review of the heritage protection system.



In fact, matters of more local heritage interest are now considered as being of material importance in land-use planning and for inclusion in development plan policies (such as a system of local listings of buildings by local planning authorities).

The key point about "material considerations" is that, under Section 38 (b) of the PCP Act 2004, there is a presumption in favour of the development plan for the determination of planning applications except if material considerations dictate otherwise. In simple terms this means that if a developer wishes to build new houses or shops, and the site being considered for this development meets the criteria for building new houses or shops, then planning permission should be given (unless material considerations dictate otherwise). However, if there are listed buildings adjoining the site or archaeological remains under the ground, for example, or the site is within a conservation area, then the impact of the proposed development on these issues is a material consideration in deciding the application for permission to develop. In this way heritage assets can be safeguarded.

Moreover, all aspects of the "historic environment" must be taken into consideration when development plan policies are being formulated. This process is being informed by characterisation and mapping studies for the "historic landscape", archaeological assessments of areas (such as whole urban areas), conservation area character appraisals, preservation and enhancement plans for such areas and other methods.

### *1.2. Consultation on the formulation of statutory plans*

Since the PCP Act 2004, new forms of statutory development plan have been formulated:

- Regional Spatial Strategies (RSS) are strategic spatial plans covering nine regions in England. These inform the next level of plans at local authority level and have replaced the old system of county structure plans and strategic aspects of unitary plans. Regional planning guidance has been turned into spatial strategies, and these are being updated.
- Local Development Frameworks (LDF) include detailed planning policies and other documents, such as policies covering the "historic environment", which may be considered through Action Area Plans. They replace the old system of local plans and the detailed policies of unitary plans. All local planning authorities must have the new types of plan in place by spring 2007.

Since the European Directive 2001/42/EC on Strategic Environmental Assessment (SEA), the plan formulation process (for both RSS and LDF) must include a systematic process of identifying and assessing the likely effects on the environment of a plan or programme, or any proposed policy (which must specifically include the "historic environment"). The SEA process requires the production of an Environmental Report for these issues.



The SEA forms part of a "sustainability appraisal" of the proposed plan or policy, an appraisal which considers social, economic and environmental effects. This appraisal must set objectives for cultural heritage and landscape, such as:

- to preserve historic buildings, archaeological sites and other culturally important features;
- to create places, spaces and buildings that "work well, wear well and look well";
- to enhance countryside and townscape character;
- to value and protect diversity and local distinctiveness;
- to improve the quantity and quality of publicly accessible open space.

The appraisal must establish indicators – benchmarks and monitoring (so that plan policies can be reviewed according to progress in meeting indicator standards) – for example, by assessing the percentage of archaeological sites and listed buildings at risk (under threat) and monitoring this.

Planning authorities consult the public on issues and options as part of the process of preparing plan policies before the formal consultation stage. Moreover, since the PCP Act 2004, as a result of making "sustainable development" a legal requirement in the planning system, planning authorities must make a "Statement of Community Involvement" – which is a formal document describing how a local authority intends to involve local communities and other stakeholders in preparing the plan (and in deciding significant issues of development control in an adopted plan).

Planning authorities also consult relevant bodies with environmental responsibilities, such as English Heritage (the government's statutory adviser on the historic environment), on the scope of the Environmental Report. Public feedback at this stage may provide more information for the Environmental Report/sustainability appraisal.

A proposed (draft) plan is then published and full public consultation/participation begins. The Environmental Report on the draft plan is made available to the public and to environmental bodies. The consultation process includes an analysis of opinions on the draft plan. This means not only the views of the public and statutory consultees, but also – for the historic environment – various heritage groups. Heritage Link, an umbrella organisation, has produced "a guide for heritage groups", which emphasises how they are particularly well placed to "assist" planning authorities to build up a robust evidence base using their knowledge, skills and understanding of an area's history and important features. Consultation also involves negotiations with objectors to the proposals. The consultation process may have several stages, one being an independent public examination of the proposals.

Taking into account the representations and the opinions of statutory consultees, the draft plans can be amended and modified. The published plan must take account of the



Environmental Report and the opinions of consultees (such as English Heritage) because it is a requirement to publish information on how these were taken into account.

Heritage policies in LDFs (local-level plans) can be extensive and wide-ranging, because heritage is regarded as being integral to sustainability and the quality of life. These heritage policies then inform the process of considering any applications for development (or changes to designated assets) that may affect heritage interests. Such heritage policies may deal with:

- access and inclusion: the LDF should include a policy for improving access for disabled people to the historic environment in a way that is sensitive to its character;
- tourism: policies to promote tourism and associated facilities should recognise the importance of the historic environment and protect heritage assets;
- arts and culture: the historic environment is an important source of local identity and pride – policies should therefore enhance the cultural heritage;
- historic townscapes and landscapes: policies should not just protect listed buildings and conservation areas, but also put forward some aspect of the undesignated historic environment that respects local distinctiveness (such as landscape, local listing of buildings or retention of distinctive local features, or through good design);
- heritage-led regeneration and development: policies should maximise the environmental, economic and community benefits of heritage-led regeneration, supporting the restoration, repair and sympathetic reuse of historic buildings and areas;
- archaeology: apart from protected sites, policies should also cover the many undiscovered archaeological sites and this may require prior evaluation of an area's archaeological potential;
- design: policies should require the design of new development to be sympathetic to its context;
- characterisation: LDFs should include policies that recognise the value of characterisation studies and their role in guiding decisions about the location, form and type of development.

### *1.3. Consultation on development proposals and works affecting designated heritage assets: current authorisation systems*

The background to development plans and policies, outlined above, is a sound basis for considering applications for development that may affect the historic environment in its widest sense. Apart from specific policies on safeguarding or enhancing heritage, the



fact that preservation of heritage assets is a material consideration in deciding development applications reveals a high level of integration between planning and heritage law. Nonetheless, consultation and public participation form an essential part of the decision-making procedure for consent applications.

#### *i. Planning applications*

In a general sense, any application for permission to develop (which includes change of use of buildings, including listed buildings, or development within the "setting" of a listed building) will be subject to a publication process to allow representations and objections; these, if deemed relevant in planning terms, will be taken into account in coming to a decision. Under Section 65 of the TCP Act 1990, developers must publish a notice in a local newspaper and put up a site notice on the land in question announcing the application for planning permission. In determining the application, the local planning authority must take into account any representations received within 21 days of the date of the application.

Furthermore, as part of the new sustainable agenda, the national guidance in Planning Policy Statement 1: Delivering Sustainable Development (published in 2005) is that the planning service should strive to ensure "openness, customer service and stakeholder satisfaction" when dealing with development consents. It stresses the importance of pre-application discussions with developers to ensure a better mutual understanding of the issues and constraints. In the course of these discussions, the proposals can be adapted to better reflect community aspirations as well as policies.

For example, in the context of conservation areas, the objective is to preserve and enhance their character and appearance. Thus, the design of new development is a key issue – early discussions can enable developers to judge whether their plans are likely to meet these criteria or to harm the area. Moreover, the planning authorities may have a conservation area advisory committee, made up of a cross-section of community interests, which will consider policy on the area and comment on proposals. Similarly, PPG 16 emphasised the importance of developers having early discussions on development in an area with archaeological potential.

All proposals to develop, whether or not they might affect heritage assets, should follow these consultation and discussion principles. In relation to designated heritage, the rules lay down specific consultation processes with the public and statutory consultees, and pre-application discussions are a key issue for any one proposing works.

#### *ii. Listed building consent applications*

"Listed building consent" (to alter, extend or demolish a listed building) is required for any works that affect the special character of a listed building. Specific types of notification are required by law:



- as with development, applications must be publicised in local papers and on site notices (so that the public can comment) if they affect the most protected buildings (grade I and II\*) or the exterior of grade II listed buildings; and the local authority must not decide the application until 21 days have passed (giving time for objections).
- English Heritage must be notified of certain types of application (particularly for proposed works involving demolition).
- the National Amenity Societies must be notified of applications to demolish a listed building. They are the Ancient Monuments Society, the Council for British Archaeology, the Georgian Group, the Society for the Protection of Ancient Buildings and the Victorian Society.
- the relevant Secretary of State must be notified where a local planning authority wishes to grant consent for works "of any consequence" – this enables the Secretary of State to "call in" the application for determination instead of the local planning authority making the decision whether or not to grant consent.

As well as those that have to be consulted (by law), there are many others who may have a particular expertise and can make a valuable contribution to the consideration of a particular proposal. These include local amenity groups and the voluntary sector, architects, local historians and others and it is generally considered important to make sure local people are kept informed to ensure there is no loss of goodwill amongst the local community.

### *iii. Conservation area consent applications*

Conservation area consent is required for the demolition of an unlisted building in a conservation area. Normally, the application to demolish must be considered at the same time as an application for planning permission for replacement development (so that the new proposals can be considered in terms of whether it will "preserve and enhance the character or appearance of the area" – or whether in fact it could cause harm to the area.

The publicity requirements for an application for conservation consent are similar to those for normal planning applications. Within London, English Heritage must also be notified of certain types of applications. The local planning authority must take account of representations made by the public (and specifically English Heritage in London).

### *iv. The role of Conservation Officers*

The first move for anyone proposing works to a listed building, or proposing to demolish a building in a conservation area, should be to discuss ideas with the Conservation Officer in the local planning authority. In some cases it will be necessary to discuss the proposed works with English Heritage.



Conservation Officers can advise the applicant whether the proposal is likely to gain consent (or what conditions may be required in order to gain consent). If consent is granted, this officer will be responsible for ensuring that the works are carried out in a proper manner and according to the terms of the consent. Such officers can be town planners, architects, building surveyors or archaeologists by profession and usually have a specialist qualification in conservation. Since 1998 Conservation Officers have been supported by their own professional body, the Institute of Historic Building Conservation (which has 2 000 members), and advertised positions for Conservation Officers usually require applicants for the post to be members of the professional body or to have considerable experience in relevant work.

Conservation Officers are key people in the integrated system. Amongst other things, they:

- undertake characterisation appraisals and advise on conservation policies in development plans (so that heritage assets are properly considered);
- undertake surveys of historic buildings at risk (through vacancy or disrepair);
- advise applicants for consents on projects on listed buildings or in conservation areas and recommend whether a project should be approved – in fact all applications affecting the wider historic environment will probably be considered by the Conservation Officer;
- supervise the work (where such applications are approved) and ensure that it is carried out according to the consent;
- advise the decision-makers on the need to take coercive action on emergency repairs or other repairing obligations under the law (the action may include expropriation if requirements are not met) and advise on enforcement to stop unauthorised work and/or require reinstatement where changes have been made illegally; such action is backed up by penal provisions (fines and the possibility of imprisonment). Enforcement Officials may be separately employed to begin proceedings where unauthorised activity takes place;
- supervise (with officers from English Heritage) any conservation or restoration work that has been given financial assistance.

Moreover, the Conservation Officer may be a key person in heritage regeneration/rehabilitation strategies, which use the heritage as a basis for improving depressed areas, liaising with English Heritage, property owners, developers and investors.

#### *v. Other consultations*

Consultations with other officials and consultees may be required for some applications that may have an impact on the historic environment. For example, investors wishing to develop in areas with "archaeological potential" (even though not scheduled sites) are



normally required to discuss their proposals with county or local authority archaeologists; and, in the case of development that may affect a Registered (non-statutory designated) Historic Park or Garden, by law English Heritage and the Garden History Society must be consulted.

#### *vi. Scheduled monument consent applications*

As ancient monuments and archaeological sites protected under the AMAA Act 1979 do not come directly under the planning system, consultations are carried in a different manner.

All applications for scheduled monument consent must be made directly to the relevant Secretary of State. In practice, English Heritage will consider the application (and will usually have preliminary discussions with applicants) and then make a recommendation to the Secretary of State for his/her decision. The Secretary of State must also take account of any representations made as a result of a notice given by the applicant to other owners of the land in question. In fact, the owners and local planning authorities are both given an opportunity to comment. The Secretary of State may also give publicity to an application "if it seems appropriate" and consider any representations made by the public or interested groups (but there is no formal requirement to publicise).

Before coming to a decision, the Secretary of State is obliged either to hold a public inquiry or at least to allow an opportunity for the applicant and "anyone else considered appropriate" to be heard before an Inspector. There is no right of appeal against the final decision (except on a point of law), which is a difference from all the other consent procedures discussed above.

However, in practice few inquiries are held under the terms of the AMAA Act 1979, since proposals for scheduled monument consent often involve planning applications as well. In this situation, the Secretary of State will generally make every attempt to ensure that both aspects are the subject of a single inquiry.

### *1.4. Authorisation procedures: a new way forward*

In England, although planning and heritage protection have been well integrated for many years, the authorisation system remains somewhat complex. A number of different consents may be required:

- planning permission – for new development and the change of use of buildings;
- building regulations approval – for health and safety aspects of new construction or change of use to existing buildings. Buildings of architectural or historic interest (whether listed or not) can be exempted from some regulations if standards such as for fire safety are met in other ways to prevent detrimental impact on the character of such buildings;



- listed building consent;
- conservation area consent;
- scheduled monument consent;
- miscellaneous consents, for example through
  - hedgerow regulations,
  - tree preservation orders, or
  - advertisement regulations.

Under an ongoing Review of Heritage Protection begun in 2004, a number of significant changes are being proposed. The aim is for simplification and greater integration between planning control and heritage protection (but not building regulation control).

The first of these changes is to create a unified Register of Historic Sites and Buildings in England, structured in two ways. The main section, compiled by English Heritage, will incorporate the existing regimes for listed buildings, scheduled archaeological sites and monuments, registered historic gardens, parks, battlefields and world heritage sites, so that sites with multiple designations can have these integrated into a single list entry where appropriate. The local section will contain a record of all conservation areas and other local designations and registers.

A second change is a proposal to review the present consent regimes. In 2003, the Office of the Deputy Prime Minister appointed researchers to examine the case for unifying a variety of planning and heritage consent regimes. In the report (Unification of Consent Regimes, Office of the Deputy Prime Minister, June 2004, Reference No. 04 SCG 02275 M) a number of different models have been considered. One proposal is the unification of planning permission, listed building consent and conservation area consent; another idea is to unify listed building consent and scheduled monument consent.

The report has recommended that the unification of authorisation systems should take place in two stages, the first being to merge listed building consent with scheduled monument consent to create a "heritage consent", and to merge planning applications with conservation area consent. The second stage – suggested for some later point in time – would be to unify the two first-stage changes into one consent regime, merging all the present regimes for planning permission and heritage consent.

One advantage of developing a unified consent system is that archaeology (scheduled sites in particular), presently outside the planning system, would become more integrated with other aspects of the historic environment already considered in the planning system.

These changes in consent regimes will require new legislation, which will take time to prepare. Moreover, it is likely that changes will be made gradually. One proposal being considered is to move in this direction by streamlining the planning application process,



introducing a standard application form to provide essential information on the full range of planning permissions and associated planning consents. An interactive electronic application form would allow submissions to be made by e-mail. The initial idea is to have an application form for planning permission for householders that can also be used to obtain listed building and conservation area consents. This would be developed over time to include a full range of permissions for different types of development.

Another proposed change is to develop the use of "management agreements". With the creation of a new Register and a unified consent regime, it is thought that management agreements could be employed wherever that approach might work better than a particular consent approach.

Management agreements could be used for:

- large buildings, sites and landscapes;
- complex historic entities that comprise more than one type of heritage asset;
- heritage assets that could be better managed in association with other regimes, such as in the natural environment;
- single types of asset in single ownership but in dispersed locations.

It is considered that these types of agreements could offer a better approach to managing heritage assets through:

- elimination of the need for close regulation for defined types of change/alteration;
- effective partnerships between owners, managers, local authorities, English Heritage and other parties;
- greater certainty and clarity for owners, users and regulators;
- complementary management with other parallel regimes (such as between the historic environment and the natural environment, as well as the planning process);
- a better understanding of relevant heritage assets over time.

All these proposed changes are being subject to consultation exercises and it will be some time before the final choices for change are formulated and given legal force through new legislation.

### *1.5. Comparison with Ireland: authorisation systems*

It is perhaps worth mentioning how Ireland has taken a lead in developing a unified approach to consents in the planning and heritage sphere. Ireland's legislation on "national monuments" originally derived from legislation in the United Kingdom, when Ireland was part of this. National monuments are similar to scheduled monuments in



England; however, until recently Ireland did not have a significant form of protection for post-1700 historic buildings. This was changed by legislation in 1999, consolidated by the Planning and Development Act 2000.

This planning legislation is used to designate "protected structures" (equivalent to listed buildings in England) and "architectural conservation areas". Furthermore, development plan objectives must be set down for:

- the conservation and protection of the environment, including in particular the archaeological and natural heritage,
- the protection of protected structures, and
- the preservation of the character of architectural conservation areas.

Whereas archaeological heritage is more specifically controlled through the National Monument Acts, there are also provisions (as above) for its protection as part of the planning system, which is generally the primary means of securing the protection of archaeological heritage in development, through the consideration of applications for planning permission.

But, in the case of protected structures and architectural conservation areas, works are directly controlled through one consent regime, namely planning permission. The definition of development in Ireland includes, in a general sense, any "works" – meaning "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal" and, in the context of protected structures, "any act or operation involving the application of plaster, paint, wall paper, tiles, or other material to or from the surfaces of the interior or exterior of the structure". So works that materially affect the character of a protected structure require planning permission.

The system in Ireland is quite similar to England, but it effectively works as if planning permission, listed building consent and conservation area consent were amalgamated into one consent regime. Thus authorisation of changes to the "built heritage" in Ireland is more directly integrated into the planning code than in England.

### *1.6. Sanctions and penalties*

Sanction and enforcement procedures for the key forms of designated heritage asset in England may change. Bearing in mind proposals to review heritage asset categorisation, it is likely that new legislation will amalgamate procedures for such things as urgent repairs and compulsory purchase.

The supervision of works to scheduled monuments is carried out by English Heritage; works relating to listed building or conservation area consent will generally be supervised by Conservation Officers. English Heritage will have a role if it has subsidised the work, and may have a role in other cases. Otherwise, measures to prevent damage/unauthor-



ised work can be checked by rights of entry for officials and through administrative remedies and criminal sanctions.

### *Rights of entry*

#### *a. Listed Buildings*

The relevant Secretary of State may authorise a right of entry for the purpose of surveying listed buildings under section 88 of the P(LBCA) Act 1990. In practice, this power may be used by planning officers from an LPA, including conservation officers, as well as officials from English Heritage. The right of entry may be used for a wide range of matters, but it is most commonly used for inspecting buildings for the purpose of selecting new entries in the statutory list of protected buildings, reviewing the condition of a listed building for the purpose of seeking repair action or to see if an offence has been committed in relation to the legal protection regime. Under sections 88A and 88B, it is a criminal offence to obstruct officials in carrying out their duties under the rights of entry provisions.

In addition to the rights of entry provisions, a local planning authority can serve a Planning Contravention Notice for the purpose of obtaining information about activities carried out on land (including buildings) where a breach of planning control is suspected. This power is backed up by prosecution provisions as the failure to comply with such a notice within 21 days is a legal offence.

The listed building regime falls under planning legislation, but unauthorised works to protected buildings are treated more strictly than unauthorised development, which is merely a breach of planning control, subject to enforcement action or a "stop notice". By contrast, to carry out works to a listed building without listed building consent is a criminal offence (see section 1.7.a, below).

#### *b. Scheduled Monuments*

The rights of entry provisions for protected ancient monuments and archaeological sites are more loosely drafted than the listed building entry provisions. Section 43 of the Ancient Monuments and Archaeological Areas Act 1979 provides a power of entry to land where a scheduled monument is located to any person authorised by the relevant Secretary of State for the purpose of surveying it, or estimating its value, in connection with any proposal to acquire the land or any other land (such as adjoining land where the extent of archaeological remains may not be precisely known) or assessing any damage to land (including the protected site) or any other land that may have a bearing on the site's safeguarding.

By obtaining access and determining where unauthorised work or damage has occurred to protected assets, action can be considered for administrative and criminal sanctions.



## 1.7. Sanctions and coercive measures

### a. Listed Buildings

#### i. Unauthorised work to listed buildings

Under sections 7 and 9(2) of the P(LBCA) Act 1990, it is a criminal offence to carry out unauthorised works to a listed building or to fail to comply with a condition attached to a listed building consent (hereafter LBC). This is an offence of strict liability: it is not necessary to prove *mens rea* (intention). Therefore, ignorance of the fact that the building was listed is insufficient. In one example from a court case, the owner of a listed building authorised a building contractor to remove from a building everything of value (by which was meant only furniture), but which the contractor interpreted as meaning architectural fixtures to the buildings. The contractor's defence was that he did not know that the building was listed and therefore, did not realise he had committed an offence. This was insufficient.

There are many reported cases of successful prosecution. Criminal sanctions can apply for each item of unauthorised work, so a developer was fined on each of 14 unauthorised actions of stripping out panelling and other features from a listed building in Soho, London.

The maximum fine for each unauthorised action on summary conviction (in the magistrates' court) was £2 000 (about €3 000) with the possibility of imprisonment for up to three months, but these were found to be insufficient as a deterrent, so in 1991 the maximum fine was raised to £20 000 (about €30 000) and the maximum prison sentence to 6 months, by amending legislation. The relevant provisions, in section 9(4) of the P(LBCA) Act 1990, also provide for conviction through indictment in the Crown Court leading to imprisonment for up to two years (originally one year) or an unlimited fine, or both. Prosecutors are often reluctant to go down this route, because it is tried by a jury (rather than being decided by a magistrate) and they may be uncertain of obtaining a conviction.

Where magistrates convict a defendant, they may decide, in the light of the evidence heard, that the Crown Court should decide the sentence (though they can do this only in the case of a individual being prosecuted, rather than a company).

The level of fine can be significant when imposed by the Crown Court. For example, in a 1998 case, the partial demolition of a building, one day after it had been listed for protection was categorised by the judge as a "cynical commercial act". After pleading guilty, the owner was fined £200 000 (based on the likely profit from redevelopment of the site) plus £13 000 costs.

Custodial sentences are extremely rare and imposed only in extreme cases. One example dating from 1992 involved a plan to cause damage to a listed chapel by the use of



explosives so as to render the building unsafe and thereby gaining grounds for obtaining consent to demolish the building for the purpose of redeveloping the site. However, instead of making a crack in the building as planned, the bungled explosion caused the front of the building to be completely blown out. This resulted in the developer being jailed for four months (and his accomplice, an explosives expert, got 28 days in prison)

In criminal prosecutions, it is usual to seek the recovery of costs arising from bringing the case. The costs can be a significant part of the overall penalty, in some cases exceeding the fine. In a 1997 case, the owner of a listed building who made major roof and internal alterations without consent was fined £6 000 plus costs of £19 720, and escaped imprisonment only because of a guilty plea and an agreement to reinstate features.

*ii. Contravention of the terms imposed by a Listed Building Enforcement Notice*

Instead of taking criminal proceedings, the local planning authority (or the Secretary of State) may issue a Listed Building Enforcement Notice (LBEN) to deal with unauthorised works (i.e. works carried out without LBC or in contravention of any conditions attached to an LBC). LBENs can also be used in conjunction with criminal proceedings. Enforcement powers under section 38 of the P(LBCA) Act 1990 are discretionary, allowing the local planning authority to consider whether it is expedient to take such action bearing in mind the relative impact of any unauthorised works upon the character of a listed building (i.e. the special character for which it was deemed worthy of protection in the first place).

An LBEN can specify various forms of action that are required, including:

- to restore the building to its former state (i.e. immediately before the unauthorised works occurred – not to the original state);
- where such restoration would not be reasonably practicable, to execute other works necessary to alleviate the effect of the works being carried out without consent;
- to bring the building to the state in which it should have been if the terms and any conditions of any consent had been properly complied with.

The LBEN must specify the date when it is to take effect and a compliance period. The local planning authority can specify different time limits within which the various requirements of the LBEN must be carried out. It must be served on the owner or may be served on any other person with an interest in the building – this could be a building contractor, architect or surveyor, where unauthorised works are actually in progress.

If the notice is not complied with, prosecution can follow. The maximum fine is £20 000 on summary conviction in a magistrates' court or an unlimited fine on indictment in a Crown Court. In determining the fine, the court can take into account any benefit resulting from non-compliance with the notice.



Following conviction for non-compliance, if the works are still not carried out, the person convicted, or any subsequent owner, may be prosecuted again. If the necessary works are still not completed, the local planning authority can enter the land and premises, carry out the work and reclaim the costs from the current owner (a subsequent owner can also reclaim the costs from the original owner). It is also an offence to obstruct a local planning authority from carrying out the work.

### *iii. Injunctions*

The ordinary method of controlling unauthorised development that requires planning permission is to serve an Enforcement Notice (similar to an LBEN for unauthorised works to listed buildings). It is also possible in these circumstances to issue a Stop Notice, which brings the Enforcement Notice into effect within three days (or less if necessary). However, the "stop" procedure can be used only against unauthorised development, not to stop unauthorised works to listed buildings.

Where a local planning authority (or English Heritage) wishes to bring a swift halt to unauthorised works to a listed building, a legal injunction may be sought from the courts (under section 44A of the P(LBCA) Act 1990) to restrain the owner of a building (or anyone else, as appropriate) from carrying out, or continuing, any authorised works. It is sometimes necessary to take urgent action to prevent a listed building being demolished or substantially altered (possibly within 24 hours!) as the use of criminal proceedings will have little effect – even if offenders are successfully prosecuted it will usually be too late to stop the damaging works being completed. If an injunction is granted and its terms are not followed, a further action can be brought for "contempt of court". The courts consider actions for contempt very seriously and can impose severe penalties, including, in appropriate cases, imprisonment.

The effectiveness of this power is shown by a case from 1990, where a property development company started work on a listed building that it owned, coating the brick exterior with adhesive and cement render without consent. An injunction was obtained the next day to stop the work, but this was ignored by the company. Following an action for contempt of court, the director of the company was fined £25 000 for the offence. The defendants agreed to pay for restorative and repair works and were ordered to pay the local authority's legal costs in bringing the case. The local planning authority subsequently served an LBEN and a Repairs Notice under section 48 of the P(LBCA) Act 1990 to restore the building.

Indeed, apart from legal remedies for unauthorised work, local planning authorities can take criminal proceedings in the case of damage caused to a listed building, and they have two potential courses of legal action in the case of buildings in poor repair (see below).

### *iv. Damage*

Under section 59 (1) of the P(LBCA) Act 1990, a person who does, or permits, any act that causes (or is likely to result in) damage to a listed building, or has the intention



of causing damage, may be prosecuted. This provision does not apply to ecclesiastical buildings (listed places of worship) so long as the building is used for religious purposes (though a person who does damage to a redundant listed church can be prosecuted), nor does it apply to listed buildings that are scheduled monuments (for which different procedures apply).

Causing damage in this context means any damage, including where works have been carried out without consent, but can include any damage that affects the character of the building as a protected building. Works likely to cause damage include work that is sufficiently substantial to harm the building and could result in its decay and eventual demolition. (It should be noted that "like-for-like" repairs to a listed building do not require consent. However, repairs that affect the character of a building could be classed as unauthorised work or could constitute damage.)

An offence relating to damage can only be tried in a magistrates' court (summarily). The maximum penalty is £1 000. However, if after being convicted a person fails to take steps to prevent any damage or further damage occurring as a result of the original act, a further offence is committed. In this case a guilty person is liable for each day that the failure continues and is subject to a daily fine.

There are no specific legal obligations placed on owners to keep listed buildings in good repair. However, if owners cannot be encouraged to take action to preserve listed buildings, then statutory powers may be utilised to enforce action.

#### *v. Urgent repairs notice*

Under section 54 of the P(LBCA) Act 1990, a local planning authority (or English Heritage in London, or elsewhere if authorised by the relevant Secretary of State) may execute urgent repairs for the preservation of an unoccupied or partly occupied listed building. The works are limited to emergency repairs to protect the building from weather damage or vandals and other matters that are thought to be "urgently necessary for the preservation of a building" (for example, work to exclude water damage, to prevent damage from organisms, to ensure safety and the stability of the building or to prevent damage by fire).

An Urgent Repairs Notice gives the owner a minimum of seven days' warning of an intention to enter the premises and carry out the work described in the notice. This period enables the owner to discuss the proposals and consider the merits of undertaking the work or whether there would be grounds to appeal against the notice. The procedure allows for the recovery of the cost of the urgent works from the owner. There are also a number of grounds of appeal against such a notice, including hardship (inability to pay).

English Heritage maintains a Register of Historic Buildings at Risk (risk being measured in terms of occupancy, disrepair and priority actions) for grade I and II\* listed buildings,



which can obtain preferential treatment for grant aid for repairs. Some local authorities maintain their own registers for (ordinary) grade II listed buildings, but these are less able to benefit from subsidies unless it is a special grant-aid scheme (usually an area-based scheme such as a Townscape Heritage Initiative).

#### *vi. Repairs notice*

A second procedure has greater significance, because it can be used with occupied listed buildings, there is no ground of appeal in the case of hardship and there are further consequences if the procedure is not complied with.

Under section 48 of the P(LBCA) Act 1990, a Repairs Notice may be served. The notice specifies a full schedule of works (not just safeguarding works, as in an Urgent Repairs Notice) that are deemed necessary for the proper preservation of the building (i.e. to return the building to its condition at the date of listing, not restoration to the original state: in the UK the approach is generally to conserve rather than to restore!). Failure to carry out the terms of the notice within two months can lead to a local authority making a Compulsory Purchase Order (CPO), a form of expropriation. Indeed, the Repairs Notice must explain this consequence.

In practice, there have been some perceived difficulties in using the Repairs Notice procedure for neglected listed buildings, because the possible consequence is compulsory purchase. Research has shown that local authorities are deterred from using this power for fear of the cost of purchase and subsequent repairs of potentially problematic buildings. Compulsory acquisition is assessed by an independent Lands Tribunal at the market value of the building, bearing in mind its condition and the protection regime, and generally assuming no redevelopment potential for the site. However, the research has also shown that this can be an effective means of promoting repair, rarely resulting in compulsory acquisition. The threat of serving a notice is often enough to induce action on a building.

#### *vii. Compulsory purchase powers*

The compulsory acquisition of a listed building is generally regarded as the last resort. In general terms, a historic building owner can avoid CPO proceedings by taking reasonable steps to preserve a building subject to a Repairs Notice, and this is usually what happens. However, an owner should not rely on the fact that financially restricted local authorities will not be able to afford to buy the property; sometimes grant-aid is given to support the authority in its action; and official guidance on the historic environment has given encouragement to the use of "back-to-back" deals, whereby the authority identifies a suitable private individual or organisation such as a building preservation trust to repurchase the property once it has been acquired by the authority. This is usually done by legal agreement before the compulsory acquisition is finalised.



### *viii. Minimum compensation orders*

If the local planning authority considers that a building has been “deliberately neglected” – there should be clear evidence that the owner has deliberately allowed the building to fall into disrepair in order to justify its demolition, so as to develop or redevelop the site or any adjoining site – it may apply for a “direction of minimum compensation” to be paid on compulsory acquisition (rather than the market value of the property). However, it is often difficult to prove that the neglect has been deliberate: an owner who could not afford to do repairs would not be “deliberately” neglecting the property.

For example, a country mansion designed by a famous British architect was compulsorily acquired, along with associated land, for £1 (about €1.50). The owner had previously applied to demolish the building, in part through various unsuccessful court hearings, to clear space for residential development. Twelve years after the first application to demolish, the building was acquired subject to the minimum compensation provisions, confirmed by the Lands Tribunal. However, cases of minimum compensation are rare because of the difficulty of proving “deliberate” neglect.

### *ix. Dangerous structures*

Where a building is in a dangerous condition, a local authority may apply to the magistrates’ court for a Dangerous Structures Order, which requires the owner to make the building safe, or else demolish all or part of it and remove the rubbish resulting from the demolition work. At first, this created a loophole in the listed building legislation that allowed an owner to demolish a neglected protected building. However, the relevant legislation (the Building Act 1984) was amended to make such orders subject to the listed building legislation.

National planning guidance on the “historic environment” (PPG 15) directs local authorities that they should not serve a Dangerous Structures Order on a listed building owner before considering repair action (using sections 48 and 54 of the P(LBCA) Act 1990). Moreover, an owner who demolishes a dangerous listed building without LBC on the grounds of health and safety (after an order is made) can only be prosecuted if they were actually notified of the need for such consent. The same rule applies to the demolition of unlisted buildings in conservation areas.

### *b. Conservation areas*

#### *i. Criminal sanctions for unauthorised demolition*

The demolition of an unlisted building in a conservation area, except in limited circumstances, is a criminal offence under sections 9(1) and 74(3) of the P(LBCA) Act 1990, because conservation area consent (CAC) is required for demolition. This offence carries the same maximum penalties as the corresponding listed building offences.



## *ii. Conservation area enforcement notice*

As an alternative to prosecution, the local planning authority can issue a conservation area enforcement notice if it considers this is needed because of the effect of the unauthorised works on the character and appearance of the conservation area. (The main goal of conservation area designation is to preserve and enhance the character and appearance of the area.)

## *iii. Injunctions*

It is also possible to use injunctions to halt unauthorised demolition of an unlisted building in a conservation area, although it could be more difficult to persuade a court to issue an injunction to prevent demolition of an unlisted building, except in the case of a persistent offender.

## *iv. Urgent repairs in conservation areas*

The power to undertake urgent repairs to listed buildings (see above) can also be used on unlisted buildings in conservation areas. The relevant Secretary of State must first give a direction that the procedure can be used (by a local planning authority or English Heritage) on the grounds that the preservation of the building is important for maintaining the character or appearance of the area.

# *c. Scheduled monuments*

## *i. Unauthorised works*

Under section 2 of the AMAA Act 1979, any person who carries out works to a scheduled monument without first obtaining scheduled monument consent (SMC) is guilty of an offence. Unauthorised activity includes works that result in demolition, destruction or damage, works of removal, repair, alteration or addition, and flooding or tipping operations in, on, or under the land where a scheduled monument is located. The effects of scheduling are therefore more severe than those of listing, particularly as all repair work requires official consent.

The penalty for failing to obtain SMC, or failing to comply with a condition attached to SMC, is a fine up to £2 000 in the magistrates' court, or an unlimited fine on conviction on indictment through a trial by jury at the Crown Court. As an example, in a case dating from 1992, a guilty plea – to one charge of causing or permitting unauthorised works to the scheduled site of the former Winchester Palace and associated Roman remains – resulted in a fine of £75 000, with £1 000 costs, being imposed for removing major stone and chalk walls from the site.

There are four defences to the section 2 procedure. In broad terms, two of these are the defence of due diligence (all reasonable precautions were taken to avoid contravening the conditions of a SMC) and the defence of avoidance of destruction or damage. A



third defence, in the case of a concealed monument, is that the defendant did not know, or had no reason to believe, that a monument was in the area affected by the works. The courts have considered a number of cases where the precise extent of a scheduled monument was in doubt and they have confirmed that it should be possible to ascertain its extent from the relevant documents, which should ordinarily include the notification of scheduling and a map. Thus, criminal liability under section 2 depends on the facts, not guesswork.

A fourth defence is allowed if works were urgently necessary in the interests of health and safety, similar to the provision for listed buildings that have become dangerous structures, though the defence is less restrictive, requiring notice in writing to the Secretary of State only as soon as is practicable.

Where unauthorised works constitute serious "damage" to a scheduled monument, it can be preferable to use a different form of offence (as below) that carries a higher maximum sentence, though it is then necessary to prove *mens rea* or intention. (This is different from the case of damage to listed buildings, as considered above.)

#### *ii. Damaging a protected monument*

Under section 28 (1) of the AMAA Act 1979, there is an offence of destroying or damaging a protected monument, meaning a scheduled monument or a monument in public ownership or guardianship; in practice any monument that is sufficiently important to merit taking into public control will be scheduled. The offence is committed by anyone who knowingly destroys or damages, or intends to do so or is otherwise reckless (i.e. does not give due consideration whether an action will harm the protected monument), though in the latter cases intention or recklessness must be proved. This procedure is normally used to prosecute cases of vandalism. The penalty is:

- on summary conviction in a magistrates' court, a fine up to £2 000 or a prison sentence up to six months, or both;
- on conviction on indictment in the Crown Court, an unlimited fine or imprisonment for up to two years, or both.

For example, the eighth Marquess of Hereford was fined £10 000 on indictment for the ploughing of a field, which resulted in serious damage to Roman remains. The Court of Appeal reduced the fine to £3 000, the court taking the view that the original fine would have been more appropriate to flagrant disregard of a monument for the purpose of personal gain, rather than negligence or inadvertence as in this case.

English Heritage proposed an increase in the maximum fine on summary conviction to £20 000, which would equal the listed building fine, but this would require an amendment to the AMAA 1979 Act. Following the present review of policy and legislation on the "historic environment", changes in fine levels are expected.



English Heritage often take the main role in cases that lead to prosecution, by keeping a record of reported incidents affecting scheduled monuments and carrying out preliminary investigations with police assistance before the Crown Prosecution Service take over the proceedings.

*iii. Using a metal detector in a protected place*

Use of a metal detector in a protected place (meaning the site of a scheduled monument) in a way that may damage the fabric of a scheduled monument, or its interpretation and understanding if artefacts are removed, is an offence under section 42 (5) of the AMAA Act 1979. The penalty for removing artefacts without consent is a fine up to £2 000 in a magistrates' court, or an unlimited fine on conviction at the Crown Court (the same as the section 2 procedure). The use of a metal detector without consent, but without removing artefacts, is subject to a fine of £200.

*iv. Injunctions*

As with unauthorised works to listed buildings, a court injunction is sometimes necessary to restrain or stop unauthorised works from proceeding any further.

*v. Mandatory reporting for chance finds*

Until 1996, chance finds of archaeological artefacts were covered by the common law concept of "treasure trove". The Treasure Act 1996 redefined treasure, removing the need to prove that the objects had been intentionally buried. The new, objective definition of treasure includes:

- objects other than coins must contain at least 10% gold or silver and must be at least 3 000 years old.
- all coins from the "same find" (such as a hoard or ritual deposit) are treasure if they are at least 300 years old when found, except that if the coins have less than 10% gold or silver there must be at least 10 coins.
- any object is classed as treasure if it was found in the same place as, or had previously been with, an object that is treasure.
- objects substantially made of gold or silver that do not fall into one of the above categories, but which would formerly have been treasure trove, are classed as treasure. These objects need not have been buried with the intention of recovery, but it must not be possible to trace their owners or heirs.

The Act also defines certain types of find that do not fall in the definition of treasure:

- objects whose owners can be traced,
- unworked natural objects, including animal and human remains, even if found with treasure,
- objects from the foreshore that are not "wreck" (so wrecked ships may be treasure).